



TC05705

Appeal number: TC/2016/02359

INCOME TAX – accelerated payment notice – penalty – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PAUL PARNABY

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS**

Respondents

TRIBUNAL: JUDGE JENNIFER DEAN

Sitting in public at Manchester on 1 March 2017

The Appellant did not attend and was not represented

**Mr T. Chacko, Counsel instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

Introduction

- 5 1. By Notice of Appeal dated 26 April 2016 the Appellant appealed against a penalty imposed by HMRC under s226 of Finance Act 2014 for the late payment of an accelerated payment notified to the Appellant in an accelerated payment notice (“APN”) issued on 13 February 2015 pursuant to s219 of Finance Act 2014. The penalty was assessed in the sum of £1,455.67.
- 10 2. The Appellant did not attend. The Appellant’s former representatives, Brackman Chopra LLP, notified the Tribunal by letter dated 18 August 2016 that it no longer acted on behalf of the Appellant. The Appellant was notified of the date of hearing by the Tribunal in a letter dated 9 January 2017. I was satisfied that the requirements of Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 have been met; the Appellant was given notification of the
- 15 hearing and it is in the interests of justice to proceed with the hearing.

Background facts

3. On 30 January 2015 the Appellant was notified that an APN would be sent to him. The Appellant was informed that:
- 20 *“Once you receive the notice, you will be legally required to pay the amount shown in it within 90 days of the date that you receive it. That date may change if you make representations objecting to the notice. You can find more information in the enclosed factsheet CC/FS24.”*
4. The APN was issued to the Appellant on 13 February 2015 showing a liability due of £60,512.70 due by 19 May 2015 together with the computation.
- 25 5. The APN explained that it had been issued because the statutory conditions had been met. The relevant conditions were set out and the notice advised:
- “Penalties for not paying on time*
- If you do not pay in full and on time, you will be liable to penalties. Any such*
- 30 *penalties would be payable in addition to the amount due. If you do not pay in full...on or before the date it is due, you will be liable to a penalty equal to 5% of the amount you still owe.”*
6. The notice also set out that the APN could not be appealed but that representations objecting to the notice could be made by 19 May 2015. If
- 35 representations were made before the due date for payment, payment would be due on or before the later of:

- The original date the payment is due; or

- 30 days after the date on which HMRC notified the Appellant of their decision in respect of his representations.

7. On 7 May 2015 the Appellant's representative wrote to HMRC objecting to the APN. The following representations were made:

- 5 (a) That Condition C of s219 FA 2014 was not met;
- (b) The amount of the APN was not agreed and a schedule was provided showing a net amount due of £34,456.83; and
- 10 (c) The Appellant was a party in judicial review proceedings in which an Order was made by which HMRC was prohibited from enforcing any APN issued.

8. The representations were considered by HMRC. On 22 October 2015 HMRC notified the Appellant that:

- (a) Condition C of s219 FA 2014 was met;
- 15 (b) The amount of the APN was confirmed in the sum of £60,512.70; and
- (c) The representations did not raise any other objections falling within Part 4 of section 222 FA 2014.

9. The letter explained how the calculation was made and advised that the due date for payment was 25 November 2015.

20 10. Further correspondence followed between the parties relating to, in the main, the Appellant's objection regarding the amount due.

11. On 4 December 2015 HMRC assessed a penalty in the sum of £1,455.67 for the late payment of the accelerated payment liability. This was calculated in accordance with s226(2) FA 2014 as 5% of the unpaid accelerated payment liability of £29,113.46 due on 25 November 2015.

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12. On 8 February 2016 the Appellant requested a statutory review stating:

- (a) The fact that HMRC in their own internal recording of payments set payments made in respect of 2007-08 against later years' tax liabilities was not relevant and should not prejudice the matter;
- 30 (b) All tax payments relating to years after 2007-08 were paid in full, therefore there is no "tax advantage" resulting to the Appellant in respect of HMRC's arbitrary allocation of tax payments against tax liabilities;
- (c) A number of issues regarding the validity of the APN had not been considered by HMRC and the payment date as detailed in the legislation still had to be determined;
- 35 (d) HMRC is obliged to treat all taxpayers fairly and equally; the payment dates for all investors in the same Syndicate should be aligned;

(e) HMRC should consider the points relating to judicial review, whether Condition C is met and the fact that the “disputed tax” is incorrect.

13. On 30 March 2016 HMRC notified the Appellant that their decision to charge a penalty had been upheld on review.

Relevant statutory provisions

Statutory provisions dealing with APNs

14. The circumstances in which an APN may be issued are found in s219 of Finance Act 2014. That section provides, in so far as is relevant to this appeal, as follows:

219 Circumstances in which an accelerated payment notice may be given

(1) HMRC may give a notice (an “accelerated payment notice”) to a person (“P”) if Conditions A to C are met.

(2) Condition A is that—

(a) a tax enquiry is in progress into a return or claim made by P in relation to a relevant tax....

(3) Condition B is that the return or claim or, as the case may be, appeal is made on the basis that a particular tax advantage (“the asserted advantage”) results from particular arrangements (“the chosen arrangements”).

(4) Condition C is that one or more of the following requirements are met—

...
(b) the chosen arrangements are DOTAS arrangements;

...

15. Section 220 of FA 2014 specifies the content of an APN and s222 entitles a person receiving an APN to make representations to HMRC objecting to the APN on the grounds that Conditions A to C in s219 are not satisfied, or objecting to the amount of accelerated payment. Any such representations must be made within 90 days of the date the notice was given.

16. There is no statutory right of appeal to this Tribunal against HMRC’s decision to issue an APN. A taxpayer may appeal to this Tribunal against a penalty imposed in as a result of the taxpayer’s failure to make an accelerated payment.

17. By virtue of s226 FA 2014 a penalty may be imposed for failure to comply with an APN:

226 Penalty for failure to pay accelerated payment

(1) This section applies where an accelerated payment notice is given by virtue of section 219(2)(a) (notice given while tax enquiry is in progress) (and not withdrawn).

5 *(2) If any amount of the accelerated payment is unpaid at the end of the payment period, P is liable to a penalty of 5% of that amount.*

10 *(3) If any amount of the accelerated payment is unpaid after the end of the period of 5 months beginning with the penalty day, P is liable to a penalty of 5% of that amount.*

18. Schedule 56 of Finance Act 2009 (“Schedule 56”) applies to penalties charged under s226 FA 2014. Paragraph 13 of Schedule 56 provides as follows:

13 Appeal

15 *(1) P may appeal against a decision of HMRC that a penalty is payable by P.*

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

19. Paragraph 16 of Schedule 56 provides as follows:

16 Reasonable excuse

20 *(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.*

25 *(2) For the purposes of sub-paragraph (1)—*

30 *(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,*

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

35 *(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.*

20. Paragraph 9 of Schedule 56 deals with “special circumstances” as follows:

9 Special reduction

40 *(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.*

(2) In sub-paragraph (1) “special circumstances” does not include—

(a) ability to pay, or

5 (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

10 (a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty

Appellant’s submissions

21. Although the Appellant did not attend I considered the grounds set out in the
15 Notice of Appeal and the correspondence from his former representative. In summary, the grounds relied upon are as follows:

(a) The sums stated as due in the APNs issued to the Appellant are incorrect;

20 (b) The APN dated 13 February 2015 was not made in accordance with the legislation as the sum demanded of the Appellant was manifestly wrong;

(c) There are ongoing judicial review proceedings against Partner Payment Notices issued by HMRC; and

(d) There is a dispute as to whether Condition C is met.

25 HMRC’s submissions

22. On behalf of HMRC Mr Chocka referred me to the following authorities:

• *The Commissioners for HM Revenue and Customs v HOK Ltd* [2012] UKUT 363 (TCC);

30 • *The Commissioners for HM Revenue and Customs v Abdul Noor* [2013] UKUT 071 (TCC);

• *Rowe v HMRC* [2015] EWHC 2293 (Admin);

• *Walapu v HMRC* [2016] EWHC 658 (Admin);

• *William Graham and Others v HMRC* [2016] EWCH 1197 (Admin);

• *Nijjar v HMRC* [2017] UKFTT 0175 (TC);

35 • *Delay v HMRC* [2016] UKFTT 774 (TC)

23. Mr Chocka invited me to follow the approach of Judge Richards in *Nijjar v HMRC* at [25]:

5 *“This is a penalty appeal and therefore I consider that HMRC have the burden of proving the facts and circumstances that result in the penalties being due. In the context of this appeal, that means that they must prove all of the following facts:*

10 *(1) That the document issued to Mr Nijjar was an APN. If it were some other kind of document (for example a mere suggestion that Mr Nijjar’s exposure to interest would be mitigated if he made a payment on account) there would be no statutory penalty for failing to pay the amount specified in it. I am satisfied that the document I saw was indeed an APN not least since it complied with all of the requirements of s220 of Finance Act 2014 and stated that it was an accelerated payment notice.*

15 *(2) That the APN was issued pursuant to s219(2)(a) of Finance Act 2014 (while an enquiry was in progress) as that is a precondition to a penalty falling due under s226 of Finance Act 2014...*

20 *(3) That Mr Nijjar had not made the accelerated payment by the due date for payment...*

(4) That HMRC had calculated the resulting penalty correctly.”

24. I was taken through the documents which showed that the Appellant was issued with a document entitled “Accelerated payment notice” on 13 February 2015 which set out within it, inter alia, the tax year to which it related, the amount due and reason for the notice being issued, the payment date and the Appellant’s right to make representations.

25. Mr Chocka highlighted the fact that the Appellant was notified of the date by which payment was due and the penalty consequences for failing to pay. There is no dispute by the Appellant that the amount remains unpaid.

30 26. HMRC considered whether any special circumstances existed such that the penalty should be reduced but concluded that there were no such circumstances. The penalty was imposed in accordance with paragraph 11(1) of Schedule 56 in that the penalty was assessed, notified to the Appellant and set out the period in respect of which the penalty was imposed.

35 27. Mr Chocka submitted that the Tribunal has no jurisdiction to consider the validity of the APN (including whether or not Condition C is met) or the amount of the accelerated payment (relying on *Noor* and *Hok*). The grounds relied upon by the Appellant therefore cannot be considered by the Tribunal; those issues fall to be determined by way of judicial review.

40 28. As regards the issue of reasonable excuse, Mr Chocka submitted that the grounds relied upon by the Appellant do not constitute a reasonable excuse. In particular, the fact there is ongoing litigation regarding the legality of APNs does not

preclude HMRC from issuing a late payment penalty. No request was made by the Appellant to stay this appeal until the conclusion of the judicial review proceedings and furthermore the Order for interim relief referred to by the Appellant was agreed in *William Graham and Others v HMRC* (in which the Appellant was a claimant) and expressly stated:

“Paragraph 1 shall be without prejudice to HMRC’s ability to...issue any notice of surcharge or penalty to a Claimant in respect of any failure to pay any accelerated payment notice...”

29. The fact that the Appellant disputes the amount of the accelerated payment is also a matter which falls outside of the Tribunal’s jurisdiction and cannot amount to a reasonable excuse for non-payment of the penalty.

Discussion and decision

30. I respectfully agree with and adopt the approach taken in *Nijjar v HMRC*. As stated by Judge Richards at [28]:

“The starting point for the Tribunal in determining whether a penalty is payable, or the amount of any penalty, must be s226 of Finance Act 2014 which imposes the penalty. That section makes no mention of Conditions A to C. The trigger for the imposition of the penalty is the failure to pay the amount specified in the APN. There is nothing in the express wording of s226 that suggests that the Tribunal must, or may, consider Conditions A to C.

Nor do I consider that it is implicit that Parliament intended the Tribunal to consider Conditions A to C. Those conditions go to whether the APN was validly issued in accordance with s219. The statutory scheme in Finance Act 2014 envisages that a taxpayer who considers that Conditions A to C are not met should make representations under s222 of Finance Act 2014 and, if not satisfied with HMRC’s response to those representations, take judicial review proceedings. The statutory scheme does not give taxpayers who consider that APNs have been wrongly issued (for example on the grounds that Conditions A to C are not satisfied) any rights of appeal to the Tribunal. That cannot be an oversight given the central role that the Tribunal plays in the adjudication of other tax-related disputes of which Parliament would have been well aware when enacting Finance Act 2014. In those circumstances, Parliament cannot have intended that taxpayers should be able, in penalty proceedings, to litigate the very issues relating to the validity of the APN on which the Tribunal has been denied jurisdiction.”

31. In those circumstances I reject the Appellant’s submissions relating to whether or not Condition C was satisfied or whether there was a tax advantage; such issues have no bearing on whether the penalty was properly imposed.

32. HMRC bear the burden of proving that the document issued to the Appellant was an APN. I am wholly satisfied that it was; it complied with the statutory requirements and stated that it was an accelerated payment notice. The APN was also

issued in accordance with s219(2)(a) FA 2014 in that it was issued whilst an enquiry was in progress. There is no suggestion that the Appellant made the accelerated payment by the due date and no evidence upon which such a finding could be made. As to whether HMRC have calculated the penalty correctly, I am satisfied that there is
5 no basis upon which to find otherwise; the validity and quantum of the APN are matters which fall outside of the scope of this Tribunal and I therefore proceed on the basis that it was lawfully issued. I consider that the comments in *O'Donnell v HMRC* [2016] UKFTT 743 (TC) (at [42] – [43]), albeit in relation to PPNs as opposed to APNs, are applicable:

10 *“Parliament has made it clear that those matters are to be dealt with by requiring HMRC to consider any representations that are made in accordance with paragraph 5 of Schedule. If a taxpayer is dissatisfied with HMRC’s response to those representations, its remedy is judicial review.*

15 *These proceedings are not concerned with the underlying assessments, but rather with the penalties that HMRC have imposed in relation to Mr O’Donnell’s failure to pay the accelerated partner payments by the due date. I do not consider that the merits or otherwise of the underlying assessment are relevant to the appeal against those penalties. Parliament has made it clear that, in cases such as this, HMRC are entitled to required taxpayers to make accelerated partner payments. If they do not pay on
20 time they are subject to a penalty subject to considerations of “reasonable excuse” and “special circumstances”. Moreover, Parliament has quite deliberately enacted statutory provisions which mean that any challenge to a PPN has to be made by way of judicial review (assuming that HMRC do not modify the PPN in the light of the taxpayer’s representations). Mr O’Donnell has chosen not to make such a challenge
25 and, having made that decision, he cannot argue that a belief, however genuinely or strongly held, in the invalidity or inaccuracy of the underlying assessments is a “reasonable excuse” for not paying the accelerated partner payment that has been determined to be due. Nor can any such belief amount to a “special circumstance”*

30 *I do not, therefore, consider that the Supreme Court’s decision in De Silva will be of “material assistance” in determining the appeal in relation to which the Tribunal has jurisdiction – namely the appeal against the penalties. I will not, therefore, stay this appeal behind De Silva.”*

33. I should note that I took into account that the Appellant is a party to on-going judicial review proceedings. However there was no formal application to this Tribunal
35 to stay this appeal until the conclusion of those proceedings, despite HMRC advising that it would not object if an application was made. I make no observations as to whether or not any such application would have been granted; the fact is that no application was made by the Appellant.

34. The issue for me to determine is whether there was a reasonable excuse for the
40 Appellant’s failure to pay the accelerated payment or whether any special circumstances exist. As stated in *Delay v HMRC* [2016] UKFTT774 (TC):

5 “...the Tribunal’s power is that set out in s15(1) of Schedule 56 namely to “affirm or
cancel” HMRC’s decision. However, that does not confer on the Tribunal an
unfettered discretion to cancel a penalty for any reason whatsoever. Our jurisdiction
derives entirely from statute and we have no judicial review function (see for example
10 CIR v Hok Limited [2012] UKUT 363 (TCC)). Moreover, s226 of FA 2014 is in
mandatory terms: if the payment of the amount specified in the APN is late, the
taxpayer “is liable” to a penalty (subject to questions of, for example, “reasonable
excuse” and “special circumstances” set out in Schedule 56). Given the mandatory
15 terms of s226 of FA 2014 and the existence of only certain specific defences in
Schedule 56, any decision we make to cancel a penalty must be rooted in the statutory
provisions that impose, or relieve, the penalty. We would have power to cancel a
penalty if the statutory requirements to levy it are not met (for example if the taxpayer
had, in fact, paid the amount due by the due date). We could cancel the penalty on one
20 of the statutory grounds set out in Schedule 56 (for example if there is a reasonable
excuse for late payment or following an application of the Tribunal’s limited
jurisdiction in relation to the question of “special circumstances” set out in
paragraph 15(3) of Schedule 56). We do not, however, have the power to cancel a
penalty on the basis that the underlying legislation breaches any fundamental
provisions relating to human rights. Those are public law matters in relation to which
we have no jurisdiction.”

35. The grounds of appeal relied upon by the Appellant disclose no reasonable
excuse; in essence they all relate to the validity and quantum of the underlying
assessment set out in the APN which do not fall within this Tribunal’s jurisdiction.

36. HMRC considered the issue of special circumstances but concluded that there
25 were none. There was no suggestion by the Appellant that this decision was flawed as
envisaged by paragraph 15(4) of Schedule 56 and I am satisfied that it was not.

37. The appeal is dismissed.

38. This document contains full findings of fact and reasons for the decision. Any
party dissatisfied with this decision has a right to apply for permission to appeal
30 against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax
Chamber) Rules 2009. The application must be received by this Tribunal not later
than 56 days after this decision is sent to that party. The parties are referred to
“Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)”
which accompanies and forms part of this decision notice.

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**JENNIFER DEAN
TRIBUNAL JUDGE**

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RELEASE DATE: 3 MARCH 2017